

No. 21,124 ✓

IN THE

**United States Court of Appeals
For the Ninth Circuit**

ROSA CONTINENTE, dba G. CONTINENTE,
Plaintiff and Appellant,

vs.

JOHN A. CONTINENTE,
Defendant and Appellee.

PLAINTIFF AND APPELLANT'S OPENING BRIEF

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PLAINTIFF AND APPELLANT'S OPENING BRIEF

Plaintiff-appellant files this opening brief in support of her appeal from a judgment entered by the District Court denying plaintiff's request to enjoin defendant-appellee from using the designation "JOHN A. CONTINENTE" as a trademark for juice grapes.

JURISDICTION

Jurisdiction of the District Court was based on U. S. Code, Title 28, Section 1338(a) and Section 1338(b), the first cause of action being based upon the trademark laws of the United States (R. 1, Para. 1; R. 14FF, Para. 1), and the second cause of action stating a related claim for unfair competition (R. 3, Para. 7).

Jurisdiction of this Court is based upon U. S. Code, Title 28, Section 1291, this appeal being taken from a final decision of a District Court of the United States (R. 101). The judgment was entered on May 6, 1966 (R. 101), and the notice of appeal was filed on June 2, 1966 (R. 104), within the 30 day period provided by U. S. Code, Title 28, Section 2107.

STATEMENT OF THE CASE

This suit is one for infringement of plaintiff's trademark "CONTINENTE" for grapes, which was registered on the principal register in the U. S. Patent Office on June 15, 1954 under No. 591,366 (plaintiff's exhibits 1, 3). Plaintiff submits that the use of defendant's own name "JOHN A. CONTINENTE" as a trademark for grapes constitutes an infringement of such registration (R. 14GG).

Defendant contended in the Court below that said registration is invalid, and that he has a right to use his own name on and in connection with the marketing of grapes (R. 14GG).

The District Court, after trial without a jury, found that plaintiff and her deceased husband had used the mark "CONTINENTE" since 1937 for grapes (R. 94, 95); that plaintiff is the owner of U. S. Patent Office Registration 591,366 of June 15, 1954, for "CONTINENTE" (R. 96); that said Registration is valid (R. 99); but that plaintiff did not establish any secondary meaning in her mark (R. 95); and that

defendant's request for its cancellation was denied (R. 101).

The District Court further found that defendant commenced marketing grapes under his own name in 1962 (R. 97); that the concurrent use of "CONTINENTE" and "JOHN A. CONTINENTE" as trademarks for grapes was not likely to lead to confusion or mistake (R. 98); that defendant had the right to use his name "JOHN A. CONTINENTE" in lettering of the same size and form as a trademark in connection with the marketing of grapes (R. 99); and denied plaintiff's request for an injunction (R. 101).

On May 6, 1966, after Judgment was entered denying plaintiff's request for injunction (R. 101), this appeal followed (R. 104).

SPECIFICATION OF ERRORS

1. The District Court erred in denying plaintiff's request for an injunction and in dismissing the Complaint (R. 99, 101).

2. The District Court erred in its finding that "defendant's use of JOHN A. CONTINENTE as a trademark for juice grapes is not likely to lead to mistake or confusion with plaintiff's use of CONTINENTE as a trademark for juice grapes" (R. 98).

3. The District Court erred in failing to apply the proper legal standard as to the statutory effect of plaintiff's registration, and instead adopting an un-

necessary and unsupported finding that plaintiff did not establish a secondary meaning to the mark CONTINENTE as applied to grapes.

QUESTION ON APPEAL

The real issue to be determined by this Court on appeal is whether defendant has the right to use his own name, to wit, "JOHN A. CONTINENTE", as a trademark, for grapes in view of plaintiff's prior use and registration of "CONTINENTE" as a trademark for grapes, particularly where

1. plaintiff's registration of "CONTINENTE" has become incontestable under U. S. Code, Title 15, Section 1065;
 2. defendant's use commenced about 25 years after plaintiff's first use and 8 years after plaintiff's registration issued;
 3. both plaintiff and defendant have their places of business in the same city; and
 4. the surname is not a common one, nor has it been used by others.
-

ARGUMENT

SUMMARY OF FACTUAL BACKGROUND

At the trial, it was made clear that plaintiff and her deceased husband used "CONTINENTE" as a trademark for grapes for a period of many years. The witness Napolitano had worked for plaintiff since

1948, and has been manager of the business since 1952, when plaintiff's husband became incapacitated and subsequently died (Tr. 16, 78).

The "CONTINENTE" brand paper label (plaintiff's exhibit 5) has been used for grapes at least as early as 1948 (Tr. 18), and the so-called side inserts, i.e., the imprinting of the "CONTINENTE" mark directly into the wood of the side panels of the lug boxes as shown in plaintiff's exhibits 7 and 8, has been used on all grape boxes since 1952 or 1953 (Tr. 22), even when a "LUGANO" brand paper label was used on an end of the box as in plaintiff's exhibit 8 (Tr. 23).

The witness Bianco also testified seeing lug boxes as shown in plaintiff's exhibit 7 in 1941 or 1942, and continuously thereafter (Tr. 50). The defendant himself acknowledged his familiarity with plaintiff's use of "CONTINENTE" as a trademark for grapes in the 1930's or early 1940's (Tr. 138).

The books and records of plaintiff in charge of Mr. Napolitano (Tr. 24) show a "CONTINENTE" grape sale as early as 1939 (plaintiff's exhibit 11, Tr. 26), and continued "CONTINENTE" grape sales in 1944 (plaintiff's exhibit 14, Tr. 27, 28), in 1945 (plaintiff's exhibit 16, Tr. 29), in 1954 (plaintiff's exhibit 20, Tr. 31), in 1955 (plaintiff's exhibit 21, Tr. 31), in 1957 (plaintiff's exhibit 22, Tr. 32), in 1962 (plaintiff's exhibit 23, Tr. 32), etc. These auction reports of sales were merely representative of other sales (Tr. 37) as were plaintiff's exhibits 12, 17, 19, etc., evidencing lug box purchases (Tr. 37, 38).

Plaintiff's exhibit 32, of a sales summary, shows some \$6,000,000.00 in grape sales for both "LUGANO" and "CONTINENTE" brand grapes. Even where "LUGANO" boxes were used, the designation "CONTINENTE" always appeared (Tr. 40), and for the period 1952-1962, irrespective of the paper label used, "CONTINENTE" appeared on the side insert as shown in plaintiff's exhibits 7 and 8 (Tr. 39).

It was also established without denial, that the word "CONTINENTE" had not been used by any person other than plaintiff as a trademark for grapes, until the defendant's use thereof (Tr. 75, 49, 50); such latter use first occurring in 1962 (Tr. 118), over 20 years after plaintiff's first use, and 8 years after plaintiff's registration (plaintiff's exhibits 1, 3).

Through the witness Bianco, a person thoroughly familiar with marks and labels used by grape growers (Tr. 48, 56-58), it was established that surnames are frequently used as trademarks for grapes (Tr. 47, 48), and that in no other instance has a surname been used by one party and the same surname and a given name used by another (Tr. 49, 50). He testified as to the high quality of plaintiff's "CONTINENTE" grapes (Tr. 51) and that such grapes were asked for by name (Tr. 51). He significantly also gave his opinion regarding likelihood of confusion in the following manner (Tr. 51, 52):

"Q. Now, with your background in the grape industry, both as a grower, shipper and as a broker or commission merchant, in your opinion, if one shipper could use a surname as a trade-

name for his grapes, and another shipper could use a surname plus a given name, do you think there is any likelihood of confusion?

A. Yes."

The defendant's own testimony revealed many interesting facets of the present controversy. Although the defendant had been selling his grapes to his uncle and to his aunt, plaintiff herein, since 1943 (Tr. 117) and as late as 1959 (Tr. 118), and although he knew of the use of the "CONTINENTE" mark by plaintiff, the following testimony of defendant on cross-examination is significant (Tr. 143):

"Q. At the time you told the Schmidt people to go ahead with Exhibit 34, you were, of course, as you testified, familiar with the fact that your uncle and aunt had used the term 'CONTINENTE GRAPES'; did you think that there might be any confusion resulting from your use of 'CONTINENTE GRAPES' and their use of it?

A. No, I didn't.

Q. You thought it would be all right for two different people to use the identical brand name?

A. Yes."

However, upon continued cross-examination, the defendant testified as follows (Tr. 159):

"Q. Tell me, do you think if the G. Continente firm puts out a very inferior grape this next year that it might affect you in future years?

A. Not if they don't go to the same market I am going to.

Q. What if they do go to the same market?

A. Then, yes, they would hurt.

Q. Would the reverse be true if you put out an inferior grape under JOHN A. CONTINENTE, do you think it might injure the G. Contiente Company in connection with their sales?

A. If they came to the same market, if it went to the same place, it would."

It may also be pointed out that even where defendant used his full name "JOHN A. CONTINENTE" as a trademark, an inspector shortened the name to "J. CONTINENTE" (Tr. 160).

Aside from the defendant's obviously naive or false understanding of business practices that the use of *identical* brand names would not result in confusion (Tr. 143), the defendant failed to produce any evidence of any kind that would show a lack of likelihood of confusion, and no other proper legal defense for his action in first adopting the identical mark previously registered by plaintiff, and then merely modifying it by adding "JOHN A." to the mark.

PLAINTIFF HAS THE EXCLUSIVE RIGHT TO USE THE REGISTERED TRADEMARK "CONTINENTE" IN COMMERCE

Under the Lanham Act, U. S. Code, Title 15, Section 1115(b), once the right to use a registered mark has become incontestable pursuant to U. S. Code, Title 15, Section 1065, ". . . the registration shall be conclusive evidence of the registrant's exclusive right to use the registered mark in commerce . . .", subject to certain enumerated defenses.

The incontestable nature of plaintiff's registration, by compliance with U. S. Code, Title 15, Section 1065, is established through the filing of the necessary affidavits by plaintiff (plaintiff's exhibit 4). Thus, plaintiff's Registration No. 591,366 of June 15, 1954 (plaintiff's exhibit 1), as amended (plaintiff's exhibit 3), is conclusive evidence of plaintiff's exclusive right to use the registered mark "CONTINENTE" on the goods specified, i.e., juice grapes.

Although certain defenses are available under U. S. Code, Title 15, Sections 1115(b)(1) to 1115(b)(7), and defendant raised the issue of the validity of plaintiff's registration (R. 14GG), the District Court in its findings, held Registration 591,366 to be valid (R. 99), and in its judgment, denied defendant's request for cancellation thereof (R. 101). No appeal was taken by defendant on this portion of the judgment, and therefore, plaintiff is entitled to the benefits of U. S. Code, Title 15, Section 1115(b) as to the conclusive nature of her exclusive right to use the mark "CONTINENTE" in commerce in connection with the marketing of juice grapes.

The incontestable rights obtainable under the Lanham Act do not treat a surname type of trademark any differently from any other type of trademark, nor otherwise diminish the benefits available to the registrant. In fact, the Act clearly recognizes that the registered mark can constitute a surname, since one defense available to a defendant under U. S. Code, Title 15, Section 1115(b)(4) is that the use of the name charged to be an infringement is a use of the

defendant's individual name “. . . otherwise than as a trade or service mark . . .”. In the present case, it is the defendant's use of his name *as a trademark* of which complaint is made, so no such defense is available to him, nor in this appeal may any other defense be properly raised.

This Court, in *Pacific Supply Cooperative v. Farmers Union Central Exch., Inc.*, 318 F.2d 894 (9th Cir. 1963), recognized the creation of substantive rights in registrations procured under the Lanham Act, including constructive notice of the registrant's claim of ownership, prima facie evidence of ownership, prima facie evidence of the validity of the registration and of the registrant's exclusive right to use, as well as the incontestable features available after any five years' use.

In *Borg-Warner Corporation v. York-Shipley, Inc.*, 127 USPQ 42 (not otherwise reported), (N.D. Ill. 1960), involving defendant's registrations of the surname “YORK”, the Court stated at page 45:

“ . . . defendant's registrations No. 520,615 has become incontestable and affords defendant a conclusive presumption of the exclusive right to use said registered trademark respecting furnace and heating products.”

The above case was cited with approval in *Richard Hudnut v. DuBarry of Hollywood, Inc.*, 127 USPQ 486 (not otherwise reported), (S.D. Calif. 1960) wherein the incontestable registration of “DU BARRY” afforded plaintiff a conclusive presumption of exclusive right thereto.

With plaintiff's rights in the mark "CONTINENTE" thus established, defendant entering the picture years subsequent to plaintiff's registration, has no basis for asserting that by his own use, he wants to restrict plaintiff's rights to a non-exclusive use, instead of the exclusive use provided by statute.

PLAINTIFF IS NOT REQUIRED TO ESTABLISH A SECONDARY MEANING TO HER REGISTERED TRADEMARK

The District Court in its findings held that plaintiff failed to establish that "CONTINENTE" had acquired a secondary meaning (R. 95), and accordingly denied plaintiff's request for relief. This finding was contrary to the testimony of Mr. Bianco who testified regarding "CONTINENTE" and other surnames used as trademarks in the grape industry. However, it is submitted that irrespective of the trial testimony, the secondary meaning theory has no application to situations involving a federally registered mark, particularly where the registration has become incontestable, as in the case at bar. As well explained in *Callmann Unfair Competition and Trade-Marks*, 2nd Edition, Volume 3, at page 1224, citing from *G & C Merriam Co. v. Saalfeld*, 198 Fed. 369, 373 (6th Cir. 1912):

"Hence came the 'secondary meaning theory' which 'contemplates that a word or phrase originally, and in that sense primarily, incapable of exclusive appropriation with reference to an article on the market, because geographically or otherwise, descriptive, might nevertheless have been used so long and so exclusively by one pro-

ducer with reference to his article that, in that trade and to that branch of the purchasing public, the word or phrase had come to mean that the article was his product; in other words, had come to be, to them, his trade-mark.' ”

Irrespective of what is required to establish a “secondary meaning” for a trade name or for a common law trademark, and even though U. S. Code, Title 15, Section 1052(e) normally prevents registration of a mark which is primarily merely a surname; Section 1052(f) provides that notwithstanding the normal prohibition of registration of surnames, the same may be registered on the principal register where the Commissioner is satisfied that the mark has become distinctive, and accept as *prima facie* evidence of such distinctiveness, the substantially exclusive and continuous use thereof by the applicant in commerce for the five year period prior to the filing of the application for registration.

Pursuant to this so-called 2(f) provision for registration of surnames, plaintiff’s registration was applied for on October 13, 1953, some sixteen years after its first use (plaintiff’s exhibit 4), and her registration was duly issued (plaintiff’s exhibits 1, 3).

Accordingly, after the Patent Office registered the trademark “CONTINENTE”, and the registration became incontestable, any question as to whether the mark, which is a surname, should have been refused registration for a lack of showing of secondary meaning, is no longer open. *John R. Thompson Co. et al. v. Holloway et al.*, 366 F.2d 108 (5th Cir. 1966).

As stated in *Iowa Farmers Union et al. v. Farmers' Educational and Cooperative Union of America*, 247 F.2d 809 (8th Cir. 1957) at page 818:

“In addition to the foregoing, Subsection (b) of Section 1057, Title 15 U.S.C.A., places the burden on the defendants to overcome the presumption arising from the registration of plaintiff's marks in the Principal Register of the Patent Office. This presumption includes the following: (1) the dissimilarity of plaintiff's marks to other registered marks for similar goods or services (2) the secondary meaning of plaintiff's marks (3) the ownership of the marks by plaintiff, and (4) plaintiff's exclusive right to use said marks in commerce in connection with the goods and services specified by the plaintiff in such registration.”

In the case at bar, there was no duty of plaintiff to establish a “secondary meaning” to her mark, since plaintiff was entitled to rely on her incontestable registration and its conclusive establishment of validity—including the secondary meaning of the mark.

If a plaintiff is required to establish a secondary meaning for a trademark registered under the federal registration statutes, the provisions of the statute would have no meaning. Proof of secondary meaning is normally required to create a technical trademark—one capable of registration—out of an otherwise unregistrable mark. Here, the registration per se voices the fact that a technical trademark exists, and a secondary meaning, if one is required, exists in fact.

**DEFENDANT HAD BOTH ACTUAL AND CONSTRUCTIVE NOTICE
OF PLAINTIFF'S TRADEMARK RIGHTS**

Plaintiff's mark is registered on the principal register of the Trademark Act of 1946 ((U. S. Code, Title 15, Chapter 22) (plaintiff's exhibits 1, 3).

Defendant had actual knowledge of plaintiff's use of "CONTINENTE" as a trademark for juice grapes (Tr. 138), and the District Court's findings as to the good faith of the defendant (R. 98, 99) are open to question, particularly where defendant's first printed labels (plaintiff's exhibit 34) constituted the word "CONTINENTE" alone as his trademark (Tr. 143), the identical word used and registered by plaintiff.

Irrespective, however, of defendant's good faith or lack thereof, or any steps taken by him to avoid deception, under U. S. Code, Title 15, Section 1072, registration of a mark on the principal register constitutes constructive notice of the registrant's claim of ownership, and under U. S. Code, Title 15, Section 1115(a), such registration constitutes prima facie evidence of the registrant's exclusive right to use the registered mark in commerce on the goods specified in the registration.

**THERE IS NO ABSOLUTE RIGHT OF A PERSON
TO USE HIS OWN NAME IN BUSINESS**

Defendant urged that because his name is in fact "John A. Contiente", that he had the right to use the same, and the Court below so held (R. 99).

While lip service is still occasionally applied to the old doctrine that every man has a right to use of his own name, the law is now clear that no man may use his own name in such manner as to injure another unfairly or fraudulently in his business. In this circuit and elsewhere, the Courts have not hesitated in granting injunctive relief against continued use of one's own name, where such use created confusion, or was likely to lead to confusion. *Max Factor & Co. v. Factor*, 226 F.Supp. 120 (S.D. Calif. 1963); *S. C. Johnson & Son., Inc. v. Johnson*, 116 F.2d 427 (2nd Cir. 1940). In *John R. Thompson Co. et al. v. Holloway et al.*, 366 F.2d 108 (5th Cir. 1966), the Court, citing extensive authority, stated at page 113:

"However, we do agree with the plaintiff that a man has no *absolute* right to use his own name, even honestly, as the name of his merchandise or his business. As such it becomes a trade name or service mark subject to the rule of priority to prevent deception of the public."

In the authoritative work of *Callmann Unfair Competition and Trade-Marks*, 2nd Edition, Volume 3, at page 1680, it is stated:

"Recent cases, however, happily indicate a greater sensitivity to the problem. Thus it has been said that: 'One must use his own name

honestly and not as a means of pirating the good will and reputation of business rivals; *and where he cannot use his own name without inevitably representing his goods as those of another he may be enjoined from using his name in connection with his business.*' ”

Continuing the discussion on pages 1686 and 1687 as to relief granted to a plaintiff against the defendant's use of his own name, the author writes:

“The basic question is whether the plaintiff's trademark is infringed by the similarity of the defendant's name.

“Where the defendant asserts his ‘sacred right’ to do business under his own name the question arises whether this right should be limited to the use of his name in or as a firm name or whether it includes the use of the name as a trademark, even though the name is not used in the firm name. It is suggested that this right be limited to the first usage.”

In the case at bar, there was little, if any, commercial necessity established for defendant to use his name as a firm name, but absolutely no such necessity for him to use his name as a trademark. The defendant may continue to use his own name to his heart's content, but should not be permitted to use it to either injure the plaintiff or to deceive or confuse the public.

DEFENDANT HAD THE BURDEN OF SELECTING A TRADE-MARK DISTINGUISHABLE FROM THAT OF PLAINTIFF AND DOUBTS MUST BE RESOLVED AGAINST IT

The basic proposition is well established in law, as well as by common business ethics, that one entering a field of endeavor already occupied by another has a duty to select a mark which is sufficiently distinguishable from the registered mark of a prior user as to avoid confusion. It is also fundamental, as stated in *Kelly Girl Service, Inc. v. Roberts*, 243 F. Supp. 225 (E. D. La. 1965); page 228:

“The burden is on the defendant to avoid confusion, mistake or deception and if doubt exists, it must be resolved against her as the latecomer.” (citing case)

Similarly, in *La Maur, Inc. v. Revlon, Inc.*, 249 F. Supp. 839 (Minn. 1965), it was said at page 845:

“Moreover, Revlon, as the latecomer, should have all doubts resolved against it.”

Defendant failed to establish any valid business purpose in adopting a trademark which included plaintiff's entire registered mark, and allegedly had plaintiff's exhibit 34 printed at the suggestion of the label company (Tr. 121). In 1963, defendant also used a different trademark, i.e. “GIOVANNI'S” (Tr. 148), clearly illustrating no absolute requirement for him to adopt and use a mark containing plaintiff's registered word “CONTINENTE”. The small duty which the law imposes on the junior use to avoid confusion is one which the defendant can and should be required to assume herein.

THIS COURT ON APPEAL CAN PROPERLY MAKE ITS OWN
DETERMINATION OF THE LIKELIHOOD OF CONFUSION

Where a defendant uses a mark which is a counterfeit, copy or colorable imitation of plaintiff's registered mark ". . . where such use is likely to cause confusion or mistake or to deceive purchasers as to the source of origin of such goods or services . . .", the defendant's liability is established under U. S. Code, Title 15, Section 1114(1)(a).

In its Findings of Fact (R. 94), and more particularly, Finding 26 (R. 98), the District Court found that defendant's use of "JOHN A. CONTINENTE" as a trademark for juice grapes was not likely to lead to mistake or confusion with plaintiff's use of "CONTINENTE" as a trademark for juice grapes.

Notwithstanding such a finding, the likelihood of confusion determination is one for this Court of Appeals to decide.

In *The Fleischmann Distilling Corporation et al. v. Maier Brewing Company et al.*, 314 F.2d 149 (9th Cir. 1963), at page 152, this Court said:

"Numerous cases in this and other circuits hold that under the circumstances here present, the question of the likelihood of confusion is one for us to decide. In *Sleeper Lounge Company v. Bell Manufacturing Co.*, 9 Cir., 253 F.2d 720, 723, this Court quoted with approval the quotation in *Miles Shoes, Inc. v. R. H. Macy & Co.*, 2 Cir., 199 F.2d 602, that 'we are in as good a position as the trial judge to determine the probability of confusion.'

“One reason for applying the rule of that case and of the other cases in accord cited in the margin is that this determination of likelihood of confusion partakes more of the character of a conclusion of law than of a finding of fact.”

In *Fleischmann*, supra, this Court, in holding the lower Court erred in denying the injunction prayed for, then stated at page 161:

“It is the general public, the unskilled purchaser, who is entitled to protection; and in determining whether there is a likelihood of confusion we must remember that the members of the purchasing public have only general impressions which must guide them in the selection of products. We think that the purchaser of a carton of beer in Ralphs’ grocery store would have no way of pulling from his pocket a precise copy of Buchanan’s label to compare with the label on the beer. His general impression relates to the name ‘Black & White’ and that is the extent of his knowledge ordinarily.”

THERE IS A STRONG LIKELIHOOD OF CONFUSION

It is difficult to perceive of a factual situation wherein the likelihood of confusion is clearer. First, the goods of plaintiff and defendant are identical, each growing and marketing juice grapes. Second, both grow and ship their grapes from the same location, and plaintiff’s labels (plaintiff’s exhibits 5, 7) and defendant’s labels (plaintiff’s exhibits 34, 35, 36) all show the origin of both party’s grapes to be in

Oakley, California. Next, a mere comparison of the marks themselves, i.e., "CONTINENTE" and "JOHN A. CONTINENTE" graphically illustrates their similarity. Also, it is clear that even though defendant may now use his full name as his trademark, there is a tendency for persons to abbreviate, and his grapes are likely to be referred to as "CONTINENTE" grapes; just as an inspector designated the defendant's grapes as "J. CONTINENTE" (Tr. 160). Further, although "CONTINENTE" is a surname, it is not a common type of surname like "SMITH", "JOHNSON" or "ROGERS". Finally, it is significant that no party other than plaintiff used any mark including "CONTINENTE" until defendant's subsequent use.

The defendant's acts are likely to cause confusion or mistake or to deceive purchasers as to the source of his grapes within the clear prohibition of U. S. Code, Title 15, Section 1114(1).

CONCLUSION

For the reasons stated above, plaintiff urges that the judgment of the District Court be reversed and that this cause be remanded with instructions to issue an injunction enjoining the defendant from using the trademark "JOHN A. CONTINENTE" or any other colorable imitation of "CONTINENTE" in connection with the marketing and commerce in juice grapes.

Dated, Oakland, California,
January 3, 1967.

Respectfully submitted,
GARDNER & ZIMMERMAN,
HARRIS ZIMMERMAN,
*Attorneys for Plaintiff
and Appellant.*

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

HARRIS ZIMMERMAN,
*Attorney for Plaintiff
and Appellant.*

(Appendix Follows)



Appendix



Appendix

LIST OF EXHIBITS

Exhibit No.	Description	Identified	Received
By Plaintiffs			
1	Certified copy Reg. 591,366	4	60
2	Certified copy Title Abstract of Reg. 591,366	4	60
3	Certified copy Amended Reg. 591,366	4	60
4	Certified copy file history Reg. No. 591,366	4	60
5	"CONTINENTE" brand grape paper label	18	60
6	"CONTINENTE" brand apricot paper label	18	60
7	"CONTINENTE" grape box with "CONTINENTE" side inserts	22	60
8	"LUGANO" grape box with "CONTINENTE" side inserts	23	60
9	Carton Label Corporation— acknowledgment of July 25, 1939 of order for 9000 "CONTINENTE" labels	25	60
10	Letter of September, 1939, D. L. Scotto, to G. Continente	25	60
11	September 28, 1939 Auction Report for "CONTINENTE" grapes	25	60
12	Dwight Lumber confirmation of order of May 18, 1944 for G. Continente apricot boxes	26	60
13	Big Lakes Box Co. manifest of May 27, 1944 Continente Apricot lug boxes	27	60

Exhibit No.	Description	Identified	Received
14	September 22, 1944 Auction Report for "CONTINENTE" and "LUGANO" grapes	27	60
15	Dwight Lumber confirmation of order of May 1, 1945 for Continente & Lugano boxes	28	60
16	October 5, 1945 Auction Report	28	60
17	Dwight Lumber invoice May 2, 1946 for "CONTINENTE" boxes	29	60
18	Loss & Damage report July 16, 1946 "CONTINENTE" brand	29	60
19	Stockton Box Invoice October 2, 1950 "CONTINENTE" side inserts	30	60
20	October 14, 1954 Auction Report	30	60
21	October 28, 1955 Auction Report	31	60
22	October 22, 1957 Auction Report	31	60
23	October 18, 1962 Auction Report	32	60
24	Letter of April 14, 1963 Swartz Bros. Ltd. to Joe Phillips, Inc.	32	60
25	Letter of September 9, 1963 Joe Phillips, Inc. to Mrs. G. Continente	33	60
26	Letter of May 14, 1964, Setrabian Co. to Mrs. Continente	34	60
27	Letter of May 20, 1964, Setrabian to Napolitano	35	60
28	1964 Contra Costa telephone directory page 260	35	60
29	1964 Contra Costa telephone directory page 231	35	60
30	G. Continente letterhead	36	60
31	Articles from Contra Costa Gazette May 29, 1959	36	60

Exhibit No.	Description	Identified	Received
32	Schedule "CONTINENTE" grape sales	38	64
33	Schedule Lugano box purchases	39	60
34	Defendant's lug box end wall with paper label of "CONTINENTE"	65	68
35	Defendant's paper label with "JOHN A." rubber stamped over "CONTINENTE"	70	150
36	Defendant's end panel with "JOHN A. CONTINENTE"	71	72
37	Defendant's end panel "CONTINENTE"	72	73
38	Defendant's end panel "GIOVANNI'S"	73	74
39	Letter September 10, 1962 to John A. Continente from Gardner & Zimmerman	143	144

Exhibit No.	Description	Identified	Received
By Defendant			
A	Deposition of Rosa Continente	87	87
B	Interrogatories Propounded to Rosa Continente	87	
C	Order & Receipt for Labels, August 23, 1962	124	124
D	Sale, etc. Documents 1962	125	126
E	Sale, etc. Documents 1962	126	
F	1963 records, sales, etc.	127	129
G	Proof of label JOHN A. CONTINENTE	129	130
H	Batch of Documents 1964 sales	131	134
I	Batch of Documents—order for "JOHN A." rubber stamp	135	135

